MALAYAN UNITED FINANCE BHD.

v.

TAN LAY SOON

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
AJAIB SINGH SCJ
MOHD. JEMURI SERJAN SCJ
[SC CIVIL APPEAL NO. 02-197-90]
29 JANUARY 1991

LAND LAW: *Priority - Charge earlier in time than sale and purchase - Doctrine of equity of redemption in English Law - Eng Ah Mooi's case - Whether applicable to statutory charge under the Code - National Land Code 1965, ss. 243, 244(1), 249(1), 266(1).*

KMT, the registered proprietor of 2 parcels of land (the said lands), charged its property on 13 June 1984 to the appellant A, as security for a loan of RM1.5 million. As a result of default in loan repayments, A took steps for foreclosure proceedings and in doing so, discovered that the respondent R had, on 12 April 1989, lodged two private caveats on the said lands.

On 10 March 1984, R had entered into an agreement with KMT whereby KMT had agreed to sell to R the said parcels of land; a draft sale and purchase agreement (S & P) and deposit was sent to KMT's solicitors. This agreement was never executed and on 23 March 1984, KMT's solicitors advised R that the deal was off. R's action for specific performance and damages against KMT is still pending.

A's demand for removal of the caveat was refused; as a result A applied to the High Court under s. 327 of the National Land Code 1965 (NLC) for the removal of the caveats, contending that its interest under the charge were indefeasible and that it ranked in priority over and above those of R. KMT also applied for the removal of the caveats under s. 326(1) NLC.

R contended that by virtue of the S & P, he had caveatable interest in the said property and that as a purchaser, he was entitled to redeem the said land to protect his interest which right A could not deny him. In addition R submitted that his right to discharge the charge transcended priority of A's charge.

KMT's application was dismissed by the High Court on the ground that R had satisfied the Court that in fact and in law, there were serious questions to be tried in relation to the contract of sale and that on the balance of convenience, it would be better to maintain the *status quo* until the trial of R's action against KMT.

In relation to A, the learned Judge proceeded to consider A's application not on the question of priority of the charge but on the basis of principles enunciated by Salleh Abas FJ in *Eng Ah Mooi's* case on the right of equity of redemption of a charge; the High Court then held that as R had succeeded in showing a triable issue as between R and A, in the balance of convenience, it would be better to maintain the *status quo* until the disposal of the action.

The issue for the Court is the indefeasibility and priority of the charge over the caveats and the R's right to redeem the charge.

In *Eng Ah Mooi's* case, Salleh Abas FJ had stated that the English doctrine of equity of redemption was applicable in that case in relation to a charge.

In this decision, the Supreme Court examined this English rule in *Eng Ah Mooi's* case and the question of mortgages and rule of equity of redemption in England before and after the Law of Property Act 1925 and compared the situation in New South Wales, Australia and in Malaysia.

Held:

[1] The legal proposition as laid down in *Eng Ah Mooi's* case, unless overruled as having been decided *per incuriam*, would have the effect of introducing a novel doctrine of equity of redemption into the concept of a statutory charge under the NLC and this would be tantamount to legislating by case law - this is not the function of the Court.

[2] (a) Under the present system of creating legal mortgages under the Law of Property Act in England, the mortgagee takes only a term of years leaving the legal freehold reversion expectant on the mortgage term in the mortgagor. Thus the mortgagor retains his legal freehold estate and cannot at the same time have an equitable estate co-extensive with it;

(b) instead of his equity of redemption constituting an equitable estate or interest, it subsists only as a right in equity to redeem the property, this right being attached to his legal freehold estate; incident to every mortgage is the right of the mortgagor to redeem;

(c) when Salleh Abas FJ was quoting *Pearce v. Morris* in *Eng Ah Mooi's* case, His Honour was in fact applying the English concept of mortgage with its incident of "equity of redemption" into our NLC where a charge is only a security for a loan without the necessity of the transfer of the estate or interest in the charged land; however, the equity of redemption and a discharge of a charge are poles apart.

[3] (a) The equity of redemption as is known in England which is in the nature of a right bears no similarity in idea and effect with the equity of redemption in New South Wales, Australia where a mortgage is closely analogous to a charge under our NLC; in practice, it is coupled with a transfer of the legal title as well - the equity of redemption is not a right but instead is a concept which has grown out of practice;

(b) 'equity of redemption' is a misnomer but persistence in its use is not a matter of law but of habit in Australia, and in Malaysia it does not exist at all, either in the sense as understood in English law or in Australia, at least in New South Wales;

(c) since the right of interests in the charged land remains with the registered owner he has nothing to redeem. To speak of the equity of redemption or the like of it under the NLC is clearly technically and legally incorrect. The term so used in relation to a charge is not only a misnomer but nonsensical;

(d) the decision in *Eng Ah Mooi's* case was made without the benefit of the Privy Council decision in the case of *Haji Abdul Rahman v. Mohamed Hassan* [1917] AC 209 whereby it was held that the term 'equity of redemption' was inapplicable to statutory charges under the NLC;

(e) *Eng Ah Mooi's* case was held to be *per incuriam* on the applicability of equity of redemption to statutory charges under the NLC.

[4] (a) There is no statutory provision in the NLC for the discharge of the charge by the chargor but his right, and that of a borrower to do so, is embodied in the provisions of the charge itself. See clause 3(ii) of the Annexure to the charge and s. 249(1) of the NLC;

(b) however under s. 266(1) any chargor may at any time before the conclusion of a judicial sale of a charged land tender the amounts due to the Registrar of the Court or the Collector to cover all expenses in connection with the judicial sale; this is a specific and exclusive right granted to the chargor.

[5] (a) R's proposition that he has a statutory or equitable right of discharge or redemption of a charge under the provisions of the NLC is rejected; however the Court affirmed the right of the chargor or the borrower to discharge a charge under the Annexure to the charge which is to be read together with s. 249(1) of the NLC which right ineluctably is not available to R;

(b) the question of the competing right to discharge the charge on the part of R does not arise at all and therefore the priority of A's charge prevails.

[Appeal allowed.]

Cases referred to:
Abigail v. Lapin [1934] AC 491
Eng Ah Mooi & Ors. v. Oversea Chinese Banking Corporation Ltd. [1983] CLJ (Rep) 144
Eng Mee Yong & Ors. v. V. Letchumanan [1979] 2 MLJ 212
Haji Abdul Rahman v. Mohamed Hassan [1917] AC 209
Macon Engineers Sdn. Bhd. v. Goh Hooi Yin [1979] 2 MLJ 53
Pearce v. Morris [1869] 5 LR Ch App 227
Tarn v. Turner [1888] 57 LJ Ch 452

Legislation referred to:
National Land Code 1965, ss. 243, 244(1), 249(1), 256, 266(1), 326(1), 327

Other source referred to:
Halsbury's Laws of England 4th Edn., pp. 190, 264

For the appellant - Y.M. Siew; M/s. Soo Thien Ming & Shahrizat
For the respondent - R.R. Sethu; M/s. L.S. Tan & Co.

JUDGMENT

Mohd. Jemuri Serjan SCJ:

This is an appeal against the decision of the High Court in Penang which was handed down on 27 March 1990, dismissing an application by Malayan United Finance Bhd., now known as Mui Finance Bhd., the appellant, for the removal of two private caveats under s. 327 of the National Land Code (Act 56 of 1965).

The following facts in so far as they are relevant to this appeal are elicited from the affidavits of the attorney of the appellant and the respondent, Tan Lay Soon. Kam Mah Theatre Sdn. Bhd., the registered proprietor, of the two parcels of land held under Perakuan Pendahuluan Mengenai Hakmilik Pegangan No. 1095 Mukim 12 Daerah Barat Daya, Pulau Pinang and Grant No. GM 79 & GM 80, Pegangan No. 1610 and 1611, Mukim 12 Daerah Barat Daya, Pulau Pinang, in consideration of a loan in the sum of RM1,500,000 advanced to it by the appellant executed on 13 June 1984 a charge in securing the repayment of the loan together with interest. The registered proprietor having defaulted in the repayment of the said loan in accordance with the provisions of the charge, the appellant took the usual preliminary steps with a view to commencing foreclosure proceedings to

enforce the charge. In doing so its attention was drawn to two private caveats both lodged by Tan Lay Soon, the respondent, on 12 April 1989, well nigh five years after the registration of the said charge.

The caveatable interest lodged by the respondent in the case of both caveats arose out of a purported agreement contained in the registered proprietor's letter dated 10 March 1989 where it had agreed to sell to the respondent the said parcels of land for a total sum of RM1,861,884. It was said that the respondent entered into the alleged agreement as trustee for the Grand Central Enterprise Sdn. Bhd. On the same day the respondent wrote to the solicitors for the registered proprietor, forwarding a cheque in the sum of RM90,394.20, being the deposit referred to in the alleged agreement and at the same time, forwarding a draft of the formal sale and purchase agreement. Not having heard from the solicitors for the registered proprietor, the respondent sent a reminder that according to the alleged agreement the sale and purchase agreement had to be approved and executed on or before 18 March 1984. However, on 23 March 1984, five days after the date of the execution of the formal sale and purchase agreement, the solicitors for the registered proprietor wrote a letter to the respondent, stating in effect that the deal was off because the conditions of the proposed agreement were not acceptable and returning the deposit of RM90,394.20. As a result the respondent filed Civil Suit No. 22-226-89 against the registered proprietor for specific performance and damages. The suit is still pending.

In the meantime the appellant gave notice to the respondent and demanded from him the removal of the caveats as clearly the respondent had chosen to ignore the appellant's interest by virtue of the charge and proceeded to enter into the purported agreement to purchase the said property subject to the charge. The respondent having refused to remove the caveats the appellant, an aggrieved body by the existence of the caveats, therefore applied to the High Court under s. 327 of the National Land Code for the removal of the caveats, citing as reasons therefore, that it was the registered chargee, presently exercising its right of sale of the charged property under s. 256 of the National Land Code and that its interests under the charge were indefeasible and ranked in priority over and above those of the respondent.

In his affidavit in opposition to the application the respondent asserted that he had caveatable interests in the said property by virtue of the fact that there was a sale agreement between him and the registered proprietor of the land whereby the latter agreed to sell the said land to him at RM9 per sq. foot. He had already paid an initial sum of RM90,394.20 in accordance with the terms and conditions agreed upon but later this sum of money was refunded when the registered proprietor repudiated the contract. In consequence of the repudiation of the contract he had filed a civil suit which is pending for specific performance and damages. He averred that as a purchaser he was entitled to redeem the said land to protect his interests which right the appellant could not deny him. To pursue this so-called right he had in fact through his solicitors enquired from the appellant the amount outstanding and payable by the registered proprietor but the appellant had refused to disclose the amount due.

It transpired that the registered proprietor also applied under s. 326(1) of the National Land Code for the removal of the two caveats and the two applications were simultaneously heard. Both applications were dismissed. It is explicit from the judgment that the registered proprietor's application was dismissed on the ground that the respondent as caveator had satisfied the Court that both in fact and in law there were serious issues to be tried in relation to the contract of sale of the charged land and that on the balance of convenience it would be better to maintain *status quo* until the trial of the action instituted by the respondent for specific performance, applying the principles in *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212.

As regards the application of the appellant for the removal of the caveats under s. 327 of the Code the appellant's case was argued principally on the basis that the charge was indefeasible under s. 340(1) of the Code and ranked in priority over the caveats, they having been registered almost five years earlier than the caveats. It seems clear beyond doubt whether the appellant was an aggrieved person or not was not an issue in the High Court and we assume, without deciding on it, it was regarded as such. Strange as it may seem to us, the learned Judge declared he was impressed with the submission on priority of the charge but instead of allowing the application on that basis in view of the dictum of Gill CJ (Malaya) at p. 55, F-H (left column) in *Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1979] 2 MLJ 53 he proceeded to consider the application on the basis of the principles enunciated by Salleh Abas FJ (as he then was) in *Eng Ah Mooi & Ors. v. Oversea Chinese Banking Corporation Ltd.* [1983] CLJ (Rep) 144, thereby completely eschewing the consideration of the question of priority of the charge over the caveats. He expressed the view that the appellant's argument on priority of the charge was an over-simplification of the issue. This is in spite of the fact the respondent conceded the priority of the charge but quite obviously the learned Judge felt bound to follow *Eng Ah Mooi's* case without even discussing the principles in the case. After quoting Salleh Abas' proposition of law on the right of equity of redemption of a charge the learned Judge concluded thus:

> Accordingly I felt bound to hold that the caveator had also succeeded in showing a triable issue as between himself and the chargee. (Page 26 of the appeal record).

What appears to have preoccupied or troubled the mind of the learned Judge which made him feel constrained to make that remark as well as those in the last two paragraphs of his judgment and dismiss the appellant's application is the decisions in *Eng Mee Yong* and *Macon Engineers* which decided that in an application for the removal of a caveat the caveator must satisfy the Court both in fact and in law that his claim is not frivolous or vexatious and that on the balance of convenience it would be better to maintain *status quo* until the disposal of the action. With all respect to apply such considerations in the context of the appellant's case obscures the real and crucial issue before the High Court. The cursory disposal of the issue by merely citing the authority of *Eng Ah Mooi* does not in our view resolve the issue but rather postpones it. It may be necessary to recapitulate that as between the appellant and the respondent both in the High Court and before us the pivotal issue is the indefeasibility and priority of the charge over the caveats on the part of the appellant and the right of the respondent, in the respondent's own words, to redeem the charge on the part of the respondent.

Learned Counsel for the respondent adopted the same arguments which he advanced in the Court below and maintained in effect that the right of the respondent to discharge the charge transcended the priority of the charge which arguments indubitably appealed to the learned Judge. This issue was not satisfactorily dealt with by the learned Judge. Under the circumstances it behoves us to examine *Eng Ah Mooi's* case in some detail particularly on the so-called equitable right to discharge a charge.

In that case the appellants sued the respondents, claiming a declaration that they were entitled to the discharge of the charge on payment of the amount due from the registered proprietor by virtue of a sale and purchase agreement they entered into whereby the land was sold at a total price of RM52,000. The respondent disputed the validity of the sale agreement as being vitiated by fraud. The High Court dismissed the suit but on appeal, the Federal Court held that the agreement was valid and that the appellants were entitled to the declaration. On the right of the appellants to discharge the charge Salleh Abas FJ at p. 210 said:

> Just as a mortgage is not irredeemable, likewise a charge is not undischargeable. Under English law a mortgagee (sic) or any person interested in the mortgaged property has the right to demand the mortgagee to redeem the mortgage on tendering the amount of debt together with interest thereon due on the mortgage. *Pearce v. Morris* [1869] 5 LR Ch App 227. We see no reason to hold that this rule of English law is inapplicable to the present appeal. In our view this rule is applicable although a lot has been said elsewhere about the differences between the common law mortgage and a charge under the Torrens System.

The legal proposition as laid down in *Eng Ah Mooi's* case, unless overruled as having been decided *per incuriam,* would have the effect of introducing a novel doctrine of equity of redemption into the concept of a statutory charge as security for a loan under Part Sixteen of the National Land Code, that is, the English Rule of right of equity of redemption. It is tantamount to legislating by case law which is not the function of the Court as we all know. We therefore consider it necessary to examine this English rule which finds favour with the Federal Court in *Eng Ah Mooi's* case and the learned Judge in the instant case. In *Pearce v. Morris* (*supra*) Lord Hatherley LC, at p. 229 spoke of this rule in the following words:

> Any person interested in the equity of redemption is entitled to redeem, and when, being so entitled, he tenders the mortgage money and interest, he, having a part in the equity of redemption, is entitled to the delivery of the title deeds, and to have a conveyance of the property.

At p. 230 in amplification he added:

> A mortgagee, though a trustee when he is paid off by the right person (as in the case of *Cholmondeley v. Clinton*) (4), has a plain duty to perform. He is only a trustee for the persons interested in the equity of redemption; and so far as the authorities have gone hitherto, he is not entitled to convey absolutely to a mere stranger to the estate, but is bound to convey to any person having an interest in the estate which gives a right to redeem. Then the mortgagee has to discharge his duty fully by making a conveyance and handing over the deeds to the person tendering him the money.

These observations ostensibly are the basis of Salleh Abas's formulation of his new concept of equity of redemption in *Eng Ah Mooi'* case.

This leads us to the question what is this doctrine of equity of redemption? For the answer, we have to examine what a mortgage and the rule of equity of redemption thereof were in England before and after the passing of the English Law of Property Act 1925. Kekewich J, in *Tarn v. Turner* [1888] 57 LJ Ch 452 explained with lucidity the concept of mortgage and equity of redemption in the following words:

> It is familiar to all of us that the law of mortgages, and more particularly, in respect of the redemption of mortgages, is founded in the first instance on the nature of a legal mortgage of freeholds - that is, upon its constitution as a conveyance of the property, with a proviso for its reconveyance in a certain event. Equity has long held that the real contract thereby created is not one of vendor and purchaser, but that it is a security for the repayment of the principal money and interest, and for the right to have the property back again in exchange for the money, if repaid at any time, although the time fixed by the covenant may long be past. The Courts have construed **that right to have the property back as an estate in the land comprised in the conveyance; it is just as much an interest or estate as the fee-simple is, and has in legal phraseology become known as the equity of redemption**. (Emphasis added).

That was the position in respect of legal mortgage prior to the Law of Property Act 1925. Since then the legal mortgage underwent a slight change in its character and so did the nature of the equity of redemption. Under the present system of creating legal mortgages

under that act the mortgagee takes only a term of years leaving the legal freehold reversion expectant on the mortgage term in the mortgagor. Thus the mortgagor retains his legal freehold estate and cannot at the same time have an equitable estate co-extensive with it. Hence, **instead of his equity of redemption constituting an equitable estate or interest, it subsists only as a right in equity to redeem the property**, this right being attached to his legal freehold estate. Nevertheless, despite the change, incident to every mortgage is the right of the mortgagor to redeem. *Halsbury's Laws of England* 4 Edn., pp 190, 264. It must be borne in mind that *Pearce v. Morris* (*supra*) is a case decided long before the Law of Property Act 1925 saw the light of day. With due respect quoting *Pearce v. Morris* in *Eng Ah Mooi's* case, Salleh Abas FJ, was in fact applying the English concept of mortgage as explained by Kekewich J in *Tarn v. Turner* with its incident of "equity of redemption" into our National Land Code where a charge is only a security for a loan without the necessity of the transfer of the estate or interest in the charged land. The equity of redemption and a discharge of a charge are poles apart.

It certainly would avoid confusion if the term equity of redemption should not be used at all in dealing with a charge under the National Land Code because in other jurisdictions, besides England, it conveys an entirely different idea. For instance, in New South Wales, Australia, it was used in a different sense altogether. In *Abigail v. Lapin* [1934] AC 491 at p. 500 Lord Wright explained that the Real Property Act 1900, New South Wales, embodied the Torrens system of registration of title to land, not of deeds and of mortgages. He said at p. 501:

> Provision is made by the Act for mortgages in statutory form, and for their registration; in such a case the legal estate remains in the registered proprietor of the fee simple, and the mortgage constitutes a charge of debt on the land; hence it may not be technically correct, though it is common, to speak of the mortgagor as having the equity of redemption, though the legal title remains in him. But a practice has sprung up of affecting what amounts to a mortgage by registering an instrument of transfer of the legal title from the mortgagor, and at the same time executing a document certifying that it was by way of security only. This is no doubt done for the purpose of facilitating dealings with the land and by the transferee.

It thus can be appreciated that the equity of redemption as is known in England which is in the nature of a right bears no similarity in idea and effect with the equity of redemption in New South Wales, Australia where a mortgage is closely analogous to a charge under our National Land Code, but in practice, coupled with a transfer of the legal title as well and where the equity of redemption is not a right but has grown out of practice. "Equity of redemption" is a misnomer but persistence in its use is not a matter of law but of habit in Australia and in Malaysia it does not exist at all, either in the sense as understood in English law or in Australia, at least in New South Wales.

Under the National Land Code the interest in the land subject to a charge does not vest in the chargee but, upon registration of a charge, it renders the land subject to the charge liable as a security only in accordance with the provisions of the charge, express or implied (s. 243). Under s. 244(1) the chargee is entitled to the custody of the issue document of title so long as the liability stays under the charge. There is no statutory provision for the discharge of the charge by the chargor but his right and that of a borrower to do so is embodied in the provisions of the charge itself. See clause 3(ii) of the Annexure to the charge and s. 249(1) of the National Land Code. However under s. 266(1) any chargor may at any time before the conclusion of a judicial sale of a charged land tender the amounts due to the Registrar of the Court or the Collector and the amount sufficient to cover all expenses in connection with the judicial sale. Since the right or interests in the charged land remains

with the registered owner he has nothing to redeem. To speak of the equity of redemption or the like of it in our situation under the Land Code is clearly technically and legally incorrect. The term so used in relation to a charge is not only a misnomer but nonsensical. In our view the decision in *Eng Ah Mooi's* case was made without the benefit of the Privy Council decision in the case of *Haji Abdul Rahman v. Mohamed Hassan* [1917] AC 209. The relevant passage of the judgment is at p. 216:

> It seems to their Lordships that the learned Judges, in these observations, have been too much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were here dealing with a totally different land law, namely, a system of registration of title contained in a codifying enactment. The very phrase "equity of redemption" is quite inapplicable in the circumstances. There is no provision in the regulation for mortgages apart from what is described as a "charge"; indeed, they are, except as regards those of the past, *de facto* abolished after the date of the enactment by s. 4 already quoted. That provides for charges, which must be made in a statutory form and must appear on the register to be effective. Under such a system the right to the land remains with the registered owner. He has nothing to redeem, his right on paying the debt being to have the charge cleared off the register.

On that account *Eng Ah Mooi's* case, must therefore, be treated as having been decided *per incuriam* only in respect of this particular issue.

In the view we take of this appeal we are disposed to reject the respondent's proposition that he has a statutory or equitable right of discharge or redemption of a charge under the provisions of the National Land Code but we would affirm the right of the chargor or the borrower to discharge a charge under the Annexure to the charge which is to be read together with s. 249(1) of the Code which right ineluctably is not available to the respondent. Besides, under s. 266(1) of the Code the right to tender payment before the judicial sale is specifically and exclusively granted to the chargor. The question of the competing right to discharge the charge on the part of the respondent does not arise at all and it follows a *fortiori* the priority of the charge prevails.

Under the circumstances we would allow this appeal with costs here and below. The appellant is entitled to have the caveats removed and we so order. The deposit is to be refunded to the appellant.

Also found at [1991] 2 CLJ 899